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Cottonwood Environmental Law Center v. United States Forest Service

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Cottonwood Environmental Law Center v. United States Forest Service, 789 F.3d 1075 (9th Cir. 2015)

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Overturning thirty-year-old precedent, *Cottonwood Environmental Law Center v. United States Forest Service* held that merely proving a procedural violation of the ESA is no longer enough to show irreparable injury in support of injunctive relief. The Ninth Circuit affirmed summary judgment for Cottonwood, concluding the Forest Service violated the ESA by not reinitiating consultation, but declined to provide injunctive relief because Cottonwood failed to show irreparable injury to the Canadian lynx.

I. INTRODUCTION

The primary issue in *Cottonwood Environmental Law Center v. United States Forest Service* was whether injunctive relief should be provided for a procedural violation of the Endangered Species Act ("ESA") by the United States Forest Service ("Forest Service") concerning the Canadian lynx.[1] Two Supreme Court of the United States cases have held that injunctive relief is not necessary under the National Environmental Policy Act ("NEPA").[2] Here, the United States Court of Appeals for the Ninth Circuit ruled these NEPA decisions overruled *Thomas v. Peterson*,[3] which held that procedural violations of the ESA are presumed to have caused irreparable harm.[4] While the Forest Service procedurally violated ESA consultation requirements, the court determined Cottonwood Environmental Law Center ("Cottonwood") failed to show irreparable harm.[5] Therefore, as the law now stands, the court was unable to provide the relief requested.

II. FACTUAL AND PROCEDURAL BACKGROUND

The United States Fish and Wildlife Service ("FWS") listed a distinct population of the Canada lynx as a threatened species under the ESA in 2000.[6] The FWS then designated the Canadian lynx's critical habitat in 2006.[7] At that

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[1] Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075 (9th Cir. 2015).

[2] Id. at 1092; *see* Winter v. Nat. Resources Def. Council, Inc., 555 U.S. 7 (2008); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).

[3] Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

[4] *Cottonwood*, 789 F.2d at 1092 (discussing *Thomas*, 735 F.2d 754).

[5] *Id.*

[6] *Id.* at 1077; *see* 16 U.S.C. §§ 1531–1544 (2012); Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx, 65 Fed. Reg. 16052, 16061 (Mar. 24, 2000).

[7] *Cottonwood*, 789 F.3d at 1077-78; *see* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx, 71 Fed. Reg. 66008, 66030 (Nov. 9, 2006).

time, the critical habitat did not include any Forest Service land within the Northern Rocky Mountains.[8] Relying on the 2006 critical habitat designation, the Forest Service implemented the Northern Rocky Mountains Lynx Management Direction ("Lynx Amendments").[9] The Lynx Amendments provided specific guidelines for multi-use permits with the possibility of affecting Canadian lynx habitat.[10] In March 2007, the FWS determined the Lynx Amendments' land and activity management policies did not jeopardize the Canadian lynx.[11] This determination was released in a FWS biological opinion ("BiOp") following consultation under Section 7 of the ESA.[12] Shortly after, in June 2007, the FWS announced the Deputy Assistant Secretary of the Interior had "improperly influenced" the critical habitat designation.[13] Subsequently, in 2009, the FWS revised the Canadian lynx's critical habitat to include eleven National Forests and a territory of 39,000 square mile—previously 1,841 square miles.[14] Over 10,000 square miles of designated critical habitat are located in the Northern Rocky Mountains unit.[15]

Despite the addition of designated critical habitat on Forest Service lands, the Forest Service failed to reinitiate consultation on the Lynx Amendments under Section 7.[16] The Forest Service relied on the Lynx Amendments in FWS BiOps for two projects in the Northern Rocky Mountains unit's Gallatin Forest and determined the projects were considered "unlikely to modify or adversely affect the Canadian lynx's critical habitat."[17]

Cottonwood filed this action in 2012 seeking injunctive relief for the Forest Service's procedural violation of the ESA when it failed to reinitiate Section 7 consultation.[18] The United States District Court for the District of Montana granted Cottonwood summary judgment without issuing its requested remedy of an injunction.[19] Both parties appealed, and the Ninth Circuit reviewed the district court's order de novo.[20]

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[8] *Cottonwood*, 789 F.3d at 1078.

[9] *Id.*

[10] *Id.*

[11] *Id.*; *see* An Act to Provide for the Conservation of Endangered and Threatened Species of Fish, Wildlife, and Plants, and for Other Purposes, Pub. L. 93-205, § 7, 87 Stat. 884 (1973), *codified at*, 16 U.S.C. § 1536.

[12] *Cottonwood*, 789 F.3d at 1078; *see* Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Contiguous United States Distance Population Segment of the Canada Lynx, 74 Fed. Reg. 8616, 8618 (Feb. 25, 2009).

[13] *Cottonwood*, 789 F.3d at 1078.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 1078-79; *see* Salix v. U.S. Forest Serv., 944 F. Supp. 2d 984 (D. Mont. 2013), *aff'd sub nom., Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075.

[19] *Salix*, 944 S. Supp. at 1002-03.

[20] *Cottonwood*, 789 F.3d at 1079.

The Ninth Circuit affirmed summary judgment for Cottonwood as well as the district court's denial of injunctive relief.[21] Even so, Cottonwood was not penalized for relying on the previous precedent of thirty years.[22] The case was remanded to the district court, where Cottonwood may still prove irreparable harm to the Canadian lynx and possibly obtain its requested injunction.[23]

III. ANALYSIS

The Ninth Circuit explored four issues on appeal. The court revisited and affirmed Cottonwood had standing,[24] the issue was ripe for review,[25] and the Forest Service had violated the ESA.[26] The court also reviewed the denial of injunctive relief for abuse of discretion.[27] Finding no abuse, the court affirmed the denial of injunctive relief.[28] This case summary does not discuss the straightforward standing and ripeness issues. The ESA violation will be explored briefly with the focus of the narrative on the truly precedential issue in this holding—the denial of injunctive relief along with Judge Pregerson's dissent.

A. Procedural Violation: A Failure to Reinitiate Consultation Under the ESA

The court determined when additional land was designated as critical habitat for the Canadian lynx in 2009, the Forest Service had violated the ESA by failing to reinitiate consultation on the additional habitat.[29] Section 7(a)(2) of the ESA stipulates:

> [a] [f]ederal agency shall . . . insure [sic] that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species.[30]

If an action may affect a critical habitat, a BiOp must be produced in order to determine if the action should be permitted.[31]

Both parties agree the 2007 BiOp satisfied the Forest Service's obligation to comply with ESA Section 7 consultation.[32] The violation occurred

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21 *Id.* at 1092.
22 *Id.*
23 *Id.*
24 *Id.* at 1079-83.
25 *Id.* at 1083-84.
26 *Id.* at 1084-88.
27 *Id.* at 1089-91.
28 *Id.* at 1088-92.
29 *Id.* at 1084-85.
30 16 U.S.C. § 1536(a)(2).
31 *Cottonwood*, 789 F.3d at 1085.
32 *Id.*

when the critical habitat was revised in 2009 and the Forest Service failed to reinitiate the required formal consultation.[33] The Forest Service argued that the Lynx Amendments were already incorporated into forest management so the NEPA standards of review applied and no need existed to reinitiate consultation.[34] The court determined the argument was flawed because the language of the ESA was clearly written to develop its own requirement to reinitiate consultation when an agency is presented with new information about an endangered or threatened species.[35] The court clearly asserted "new protections triggered new obligations. The Forest Service cannot evade its obligations by relying on an analysis it completed before the protections were put in place."[36]

B. Injunctive Relief: Procedural Violations Require Irreparable Harm

Cottonwood argued the Ninth Circuit should reverse the district court's denial of injunctive relief and follow its previous holding in *Thomas*.[37] In *Thomas*, the Ninth Circuit had "long recognized an exception to the traditional test for injunctive relief when addressing procedural violations under the ESA."[38] The traditional test for injunctive relief has four parts, the first of which requires proof of irreparable harm.[39] *Thomas* removed the burden to prove irreparable harm if there was a procedural violation.[40]

Thomas held an injunction was an appropriate remedy based on "[t]he procedural requirements of the ESA [being] analogous to those of NEPA" and that "[i]rreparable damage is presumed to flow from a failure to properly evaluate."[41] In *Cottonwood*, the court considered the assertion there was "no reason" the procedural exception for injunctive relief applicable to NEPA claims "should not apply to procedural violations of the ESA," a "critical" element of the *Thomas* holding.[42]

The Forest Service argued that *Thomas* has been overruled by two Supreme Court cases that dispensed with the procedural exception to NEPA.[43] One of these cases went so far as to consider injunction an inappropriate form of

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[33] *Id.*

[34] *Id.*

[35] *Id.* at 1085-86; *see* Reinitiating of Formal Consultation 50 C.F.R. § 402.16 (2015).

[36] *Cottonwood*, 789 F.3d at 1086.

[37] *Id.* at 1088.

[38] *Id*. (discussing *Thomas*, 753 F.2d at 764.)

[39] *Id*.

[40] *Thomas*, 753 F.2d at 764.

[41] *Cottonwood*, 789 F.3d at 1088-89; *see Thomas*, 753 F.2d at 764 (citing Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984); Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 330 (9th Cir. 1975)).

[42] *Cottonwood*, 789 F.3d at 1089.

[43] *Id*.; *see Winter*, 555 U.S. 7 (increasing the burden to show irreparable harm from likely to a possibility); *Monsanto*, 561 U.S. 139 (making injunction a remedy only if irreparable harm is shown in the traditional four-factor test).

relief except in "unusual circumstances," because "there is nothing in NEPA that allows courts considering injunctive relief to put their 'thumb on the scales.'"[44]

The court also considered whether the ESA and the NEPA were different enough as to make them incomparable.[45] The court analyzed whether Congress spoke on this issue and whether the Supreme Court interpreted the level of discretion courts are afforded.[46] The Ninth Circuit determined nothing in the ESA inferred or explicitly gave guidance on a court's discretion to find irreparable injury.[47] It was in this context the Ninth Circuit denied injunctive relief, relying on current NEPA holdings—the same manner in which the precedent in *Thomas* was established.[48]

C. United States Circuit Judge Harry Pregerson's and Dissenting Opinion

Circuit Judge Pregerson believed the majority inappropriately denied injunctive relief.[49] Judge Pregerson did not believe *Thomas* was overruled by the change in the NEPA's interpretation.[50] Instead, Judge Pregerson thought the majority "fail[ed] to appreciate the critical difference between [the NEPA and the ESA]."[51] Judge Pregerson asserted the purpose of the NEPA is procedural, whereas the purpose of the ESA is to protect threatened and endangered species.[52] Judge Pregerson was concerned with the practical application of the court's holding in future litigation.[53] Judge Pregerson questioned whether district courts would be able to properly pass judgment on irreparable harm.[54]

Judge Pregerson also worried the majority did not consider the scientific work required to make a determination of irreparable harm, stating "[i]t is important to note that the majority opinion eliminates *Thomas*' procedural protections as a global storm of extinction rages."[55] On this issue, Judge Pregerson's dissent is directly confronted in the majority opinion, which quotes his charged language.[56] While the majority found its holding easily understandable and aligned with the objectives of the ESA,[57] the dissent believed

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[44] *Cottonwood*, 789 F.3d at 1089; *see Monsanto*, 561 U.S. at 157.
[45] *Cottonwood*, 789 F.3d at 1089-91.
[46] *Id.* at 1089-90.
[47] *Id*. at 1090; *see* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987).
[48] *Cottonwood*, 789 F.3d at 1091.
[49] *Id*. at 1092-95 (Pregerson, J., dissenting).
[50] *Id*. at 1093.
[51] *Id*.
[52] *Id*.
[53] *Id*. at 1094-95.
[54] *Id*. at 1093.
[55] *Id*. at 1094.
[56] *Id*. at 1091 (majority opinion).
[57] *Id*. at 1092.

the majority did not follow Congress's directive to "afford . . . endangered species the highest of priority."[58]

IV. CONCLUSION

This case is significant as it overturns *Thomas* and increases the burden of proof for those attempting to enforce procedural violations of the ESA. Despite the Forest Service's clear violation of the ESA, by failing to reinitiate Section 7 consultation, the court refused to apply an injunction without proof of irreparable harm. The dissent worried that in practice, showing irreparable harm will prove onerous. As *Cottonwood* stands, in order to obtain an injunction within the Ninth Circuit based on procedural violations of the ESA, the burden to show irreparable harm rests on those prosecuting ESA claims.

[58] *Id*. at 1093 (Pregerson, J., dissenting); *see* Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987).